Opinion No. 7/2018

concerning Vital Ndikumwenayo, Innocent Manirambona, Alphonse Akimana, Firmin Niyonkuru, Dismas Nduwayezu, Claude Nkeshimana, Télesphore Mbazumutima, Denis Bigirimana, Jean-Pierre Kantungeko, Dismas Birigimana, Thadée Kantungeko, Bernard Bigirimana, Berchmans Manirakiza, Sylvestre Nzambimana, Elias Hakizimana, Jean-Marie Nshimirimana, Astère Nahimana, Audace Nizigiyimana, Bernard Ndayisenga (Burundi)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), the Working Group transmitted to the Government of Burundi, on 21 December 2017, a communication concerning Vital Ndikumwenayo, Innocent Manirambona, Alphonse Akimana, Firmin Niyonkuru, Dismas Nduwayezu, Claude Nkeshimana, Télesphore Mbazumutima, Denis Bigirimana, Jean-Pierre Kantungeko, Dismas Birigimana, Thadée Kantungeko, Bernard Bigirimana, Berchmans Manirakiza, Sylvestre Nzambimana, Elias Hakizimana, Jean-Marie Nshimirimana, Astère Nahimana, Audace Nizigiyimana and Bernard Ndayisenga. The Government has not replied to the communication. The State has been a party to the International Covenant on Civil and Political Rights since 9 May 1990.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. This case concerns the following 19 persons:
(a) Major Vital Ndikumwenayo, born in XXXX in Bururi and detained in Rumonge prison;
(b) Captain Innocent Manirambona, born in XXXX in Minaro and detained in Muramvya prison;
(c) Second Lieutenant Alphonse Akimana, born in XXXX in Bujumbura and detained in Rumonge prison;

(d) Major Warrant Officer Firmin Niyonkuru, born in XXXX in Bururi and detained in Muramvya prison;
(e) Warrant Officer Dismas Nduwayezu, born in XXXX in Bururi and detained in Gitega prison;
(f) Warrant Officer Claude Nkeshimana, born in XXXX in Mwaro and detained in Gitega prison;
(g) Warrant Officer Télesphore Mbazumutima, born in XXXX in Mwaro and detained in Gitega prison;
(h) First Sergeant Major Denis Bigirimana, born in XXXX in Kayanza and detained in Rumonge prison;
(i) Corporal Jean-Pierre Kantungeko, born in XXXX in Bururi and detained in Gitega prison;
(j) Corporal Dismas Birigimana, born in XXXX in Bururi and detained in Muramvya prison;
(k) Corposal Thadée Kantungeko, born in XXXX in Bururi and detained in Gitega prison;
(l) Corporal Bernard Bigirimana, born in XXXX in Bururi and detained in Gitega prison;
(m) Corporal Berchmans Manirakiza, born in XXXX in Gitega and detained in Gitega prison;
(n) Corporal Sylvestre Nzambimana, born in XXXX in Mwaro and detained in Rumonge prison;
(o) Corporal Elias Hakizimana, born in XXXX in Muramvya and detained in Muramvya prison;
(p) Corporal Jean-Marie Nshimirimana, born in XXXX in Gitega and detained in Muramvya prison;
(q) Corporal Astère Nahimana, born in XXXX in Kayanza and detained in Muramvya prison;
(r) Corporal Audace Nizigiyimana, born in XXXX in Mwaro and detained in Muramvya prison; and
(s) Lance Corporal Bernard Ndayisenga, born in XXXX in Kayanza and detained in Gitega prison.

Background

5. The source reports that the Arusha Peace and Reconciliation Agreement of 28 August 2000, which sought to terminate the civil war that had been raging since 1993, provided for governance principles conducive to power-sharing between the different components of the population of Burundi. One reform consisted in reconstituting the army so that it was composed of an equal proportion of Hutus and Tutsis. Accordingly, a new national defence force composed of the rebels and the former army, in line with the principle of ethnic representation, was established in 2003.
6. According to the source, since 2010 Burundi has once again been the scene of persistent violence, especially since the re-election of President Pierre Nkurunziza, on account of the strong opposition and the crimes committed against it. There has been an increase in attacks on Government forces and violent crackdowns on the opposition involving arrests, mass detention as well as ill-treatment and killings. In addition, the source reports that lawyers, human rights defenders and journalists have been the target of such abuse since July 2011.
7. The policy of repression intensified after the announcement of the President's third term and the failed coup of 13 May 2015. The source reports that a citizens' protest movement was launched in April 2015 to demand compliance with the Arusha Agreement. The movement was violently repressed by the police and by the Imbonerakure militia, which was set up by the former rebels, who hold power today. According to the source, these two repressive forces, the police and the militia, specifically targeted civil society and human rights defenders. Most human rights defenders have been living in hiding since then or have gone into exile. The source also reports that leaders of opposition political parties have allegedly been murdered or are missing.
8. Lastly, the source reports that the repression has been accompanied by purges targeting primarily members of the former armed force of Tutsi ethnicity. Since the launching of the peaceful demonstrations in April 2015, the former rebels, who are currently in power, target soldiers from the former army, who are victims of murder, abduction, disappearance or arbitrary detention.
9. The source also reports that there is a general problem of judicial corruption, which creates a sense of legal insecurity among citizens. The problem is linked to the failure to allocate adequate resources to judges and results in diminished commitment on the part of the judiciary, a lack of independence and, in addition, interference by the executive. The source also reports a lack of legal assistance and of compensatory procedural safeguards, as well as cases of harassment and threats against lawyers. All these recurring phenomena in Burundi entail, according to the source, fundamental violations of the right to a fair trial and other rights of the defence.

Arrest and detention

10. The source reports that the crisis relating to the President's third term produced palpable tensions. Sporadic gunfire was heard almost throughout the night of 11 to 12 December 2015. The source also reports the self-proclamation of two rebel movements. Unidentified armed groups attacked various military camps in Bujumbura almost simultaneously during the night and were repelled. Weapons were allegedly stolen from two military camps.
11. Following these attacks, the defence and security forces and the Imbonerakure militia, according to the source, perpetrated targeted killings of civilians from disputed neighbourhoods. As a result, 87 people, described by the army spokesman as “rebels”, were allegedly killed.
12. Moreover, on 12 December 2015, the National Intelligence Service allegedly selected 19 soldiers from the former army, all ethnic Tutsis, from the 85 soldiers tasked with guarding the attacked camps, and imprisoned them on the pretext that they were in collusion with the rebels. The situation of the persons concerned, who have been detained ever since, is addressed in this case.
13. The source believes that their arrest was based on discriminatory grounds involving harassment of soldiers belonging to the Tutsi ethnic group. The source alleges that an army general who supervised their arrest expressed ethnic hatred of soldiers of Tutsi ethnicity.
14. The source claims that the 19 soldiers were detained and interrogated in military police cells by the intelligence service of the Army General Staff from the day of their arrest until 22 December 2015. The source also alleges that the minutes were prepared by officers of the army intelligence service who were incompetent, since the service lacks the authority of the Military Prosecutor's Office.
15. A public prosecutor from the Bujumbura Court of Appeal reportedly had them sent to Muramvya Prison. The source alleges that the prosecutor in question also lacked the requisite authority because the Military Prosecutor's Office is the sole authority with competence to investigate offences potentially committed by soldiers, or alternatively the Attorney General, in consultation with the Chief Military Prosecutor, in accordance with article 127 of the Code of Judicial Organization and Jurisdiction of Burundi. The source alleges that no written decision to apply article 127 was adopted. Even if the Attorney General had entrusted the file to the chief public prosecutor at the Court of Appeal, jurisdiction to rule on the case remained, according to the source, with the Military Court of Bujumbura.
16. In the source's opinion, these cases were not referred to military courts with jurisdiction to rule upon them. The Court of Appeal in question is only authorized to try military personnel in cases involving complicity with civilians, but no civilian is mentioned in the case file in question.
17. In addition, the source notes that article 14 of the Legislative Decree of 27 August 1980 concerning the Code of Organization and Jurisdiction of Military Courts stipulates that: “In a case involving interlinked offences committed by several military officers of different ranks, the competent court shall be that with jurisdiction to try the highest ranking officer.” Article 11 of the Decree stipulates that: “The Military Court shall only try offences under article 9 committed by army officers of a rank equal to or greater than that of a major and by officials assimilated to them pursuant to a decree.” The source therefore considers that the 19 defendants should be tried by the Military Court, which is authorized to try the highest ranking officer, in this case the Major.
18. The source alleges that, in addition to the unlawful 11-day period of police custody ordered by the authorities conducting the investigation, the 19 individuals were sent to Muramvya prison without having appeared before the detention judge and were therefore never charged, notwithstanding the provisions of the Code of Criminal Procedure, according to which “[n]o ruling may be issued on a case until the lawfulness of the detention has been exhaustively reviewed” (art. 112) and “[t]he investigating judge … shall decide on a person's release or the issuance of an arrest warrant. The person concerned shall appear before the judge no later than 15 days after the issuance of the arrest warrant” (art. 111).
19. The source reports that the said persons were accused of breaching internal security and of complicity with the persons who carried out the attacks.
20. According to the source, the Court of Appeal of Bujumbura, despite the alleged shortcomings, held a public hearing on 8 January 2016, invoking the pretext of flagrante delicto, following which it conducted deliberations on the case.

21. The source reports that the Court of Appeal of Bujumbura, invoking the right to flagrante delicto proceedings, launched expedited deliberations on the case without enabling the defendants to exercise their right to legal aid and to present a defence. An unfair judgment was handed down on 12 March 2016, and the lawyers and defendants were not provided with a copy thereof. The source alleges that the flagrante delicto proceedings were designed to prevent the defence from accessing the file, which constituted a violation of the rights of the defence.
22. With regard to the flagrante delicto proceedings invoked as a pretext for holding a hearing, the source argues that the charges levelled against the 19 persons did not fall into the category of flagrante delicto. The source points out that the legal conditions laid down in article 21 of the Code of Criminal Procedure for flagrant offences were not met: their arrest was not related to a hue and cry or a flagrant offence, and the said persons were not found to be in possession of objects suggesting that they had participated in the crime.
23. The source further alleges that, according to the Public Prosecutor's Office, police custody in the event of a flagrant offence may not, according to article 21 of the Code of Criminal Procedure, exceed 36 hours. Police custody in the case in question continued for 11 days, thereby exceeding the prescribed time limit.
24. With regard to the violations of the right of defence, the source alleges that the 19 persons were denied access to assistance from lawyers both during the preliminary stage and during the first-instance judicial proceedings. On the day of the hearing, some lawyers reportedly turned up and unsuccessfully requested access to the file. The lawyers nonetheless raised an objection to the jurisdiction of the Court of Appeal to deal with an exclusively military case. However, the Court failed to rule on the objection to jurisdiction, thereby breaching article 161 of the Code of Criminal Procedure, ruled on the merits without prior deliberations and convicted the defendants. Four persons were sentenced to life imprisonment and the remaining 15 were sentenced to a 20-year term of imprisonment. According to the source, the Court thus invoked the pretext of flagrante delicto proceedings, but violated the right of defence inasmuch as the accused persons were denied the assistance of a lawyer and were unable to present a defence.
25. The source reports that the case has, since then, been heard on appeal and before the Supreme Court. The 19 detainees are continuously moved from one prison to another and allegedly face a permanent risk of execution.
26. In light of the foregoing, the source argues that the detention of the 19 persons falls under categories I and III.

Response from the Government

27. A communication concerning these allegations was sent to the Government of Burundi on 21 December 2017. The Working Group, in accordance with its methods of work, set 20 February 2018 as the time limit for its response. The Working Group regrets that it did not receive a response from the Government to the communication nor a request for an extension of the time limit.

Discussion

28. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.
29. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the source has submitted allegations which are free from inherent contradiction and substantiated by items of evidence provided by the source. Moreover, the current situation in Burundi as well as the recurrent allegations of related violations, such as arrests, arbitrary detention, biased judges and failure to respect the rights of the defence, have been extensively documented, as evidenced by previous Group opinions.[1] This enhances the credibility of the source. Accordingly, the lack of a response from the Government implies that it has deliberately chosen, contrary to its interests, to refrain from challenging the prima facie credible allegations.
30. The Working Group recalls that it has repeatedly expressed concern regarding such allegations in its jurisprudence.[2] The Working Group also takes note in this connection of Human Rights Council

resolutions S-24/1 of 17 December 2015 and 33/24 of 30 September 2016, and the report of the United Nations Independent Investigation on Burundi established pursuant to Human Rights Council resolution S-24/1 (A/HRC/33/37), which states that “arbitrary arrests and detention have been a cornerstone of the repression in Burundi and have opened the way for a wide range of other human rights violations” (para. 65) and that the investigations “confirmed abuse of pretrial detention” (para. 70). In the present case, the Government has chosen not to rebut the credible allegations submitted by the source, which the Working Group therefore considers to have been substantiated.

31. The source reports that the 19 persons concerned, after spending 11 days in custody, were sent to Muramvya prison without appearing before a judge. The relevant international norm requires all arrested and detained persons to be brought promptly before a judge. The Working Group reflected this norm in principle 8, read in conjunction with principles 4 and 6 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court (A/HRC/30/37). The Human Rights Committee, commenting on the same norm, stated that a reasonable period for bringing an arrested person before a judge should be interpreted as a period not exceeding 48 hours.[3] The Working Group also notes that, according to the source, this is the period prescribed by article 113 of the Code of Criminal Procedure of Burundi, which is therefore in conformity with article 9 of the Covenant. Furthermore, the Working Group has consistently held that pretrial detention must be an exceptional measure and as such should be justified in each individual case.[4] The Working Group concludes that, given the violation of this international norm in the present case, the detention of the persons concerned is devoid of any legal basis. Their detention is therefore arbitrary under category I. At the same time, the Working Group notes that the argument concerning flagrante delicto cannot prevail in the absence of adequate temporal elements.

32. The source also states that the 19 individuals were denied the effective assistance required to prepare their defence and that they were unable to access the content of their file or their judgments. Given these allegations, the Working Group draws attention to general comment No. 35 (2014) of the Human Rights Committee, according to which States parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.[5] It also notes that, according to the Committee's general comment No. 32 (2007), the right to communicate with counsel requires that the accused be granted prompt access to counsel.[6] The Committee states in the same comment that the right to equality before courts and tribunals guarantees the principles of equal access and equality of arms, and ensures that the parties to the proceedings are treated without any discrimination.[7]

33. The Working Group therefore considers that the facts reported by the source reveal numerous violations of the right to a fair trial, including violation of the right to liberty while awaiting trial, violation of the right to legal representation, and violation of the parties’ right to equality of arms during the proceedings. The continuous detention in this case thus violates articles 9 and 14 of the Covenant; article 7 of the African Charter on Human and Peoples’ Rights; article 10 of the Universal Declaration of Human Rights; rules 43, 44, 45 and 119 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules); and principles 4, 11, 18, 32 (1), 37, 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group considers that these violations are of such gravity as to give the deprivation of liberty an arbitrary character under category III.

34. The source mentioned discrimination in the response to the crisis, and indicated that the 19 persons concerned are all Tutsis and hence belong to the group targeted by the discrimination. Although it presented no arguments concerning category V, the Working Group is free to consider all categories of arbitrary detention that are relevant when it comes to characterizing the facts of the case. Furthermore, the Working Group considers that the arrest and detention of the persons concerned are clearly the outcome of ethnic discrimination and are therefore arbitrary under category V.

Disposition

35. In light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Vital Ndikumwenayo, Innocent Manirambona, Alphonse Akimana, Firmin Niyonkuru, Dismas Nduwayezu, Claude Nkeshimana, Télesphore Mbazumutima, Denis Bigirimana, Jean-Pierre Kantungeko, Dismas Birigimana, Thadée Kantungeko, Bernard Bigirimana, Berchmans Manirakiza, Sylvestre Nzambimana, Elias Hakizimana, Jean-Marie Nshimirimana, Astère Nahimana, Audace Nizigiyimana and Bernard Ndayisenga, being in contravention of article 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls under categories I, III and V.

36. The Working Group requests the Government of Burundi to take the necessary steps to remedy the situation of the 19 persons without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

37. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release the 19 persons immediately, to accord them an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide them with appropriate medical care.

38. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of the 19 persons and to take appropriate measures against those responsible for the violation of their rights.

Follow-up procedure

39. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether the 19 persons have been released and, if so, on what date;

(b) Whether reparations, including compensation and a guarantee of non-repetition, have been made to the 19 persons;

(c) Whether an investigation has been conducted into the violation of the 19 persons' rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Burundi with its international obligations, in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

40. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

41. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

42. The Government should disseminate through all available means the present opinion among all stakeholders.

43. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[8]

[Adopted on 18 April 2018]

[1]See opinions No. 30/2015; No. 8/2016; No. 54/2017; No. 57/2012; No. 17/2012; and No. 33/2014.
[2]Ibid.
[3]See the Committee's general comment No. 35 (2014) on liberty and security of persons, para. 33.
[4]See opinion No. 62/2017 (A/HRC/WGAD/2017/62). See also general comment No. 35, para. 38.
[5]See general comment No. 35 (2014), para. 35.

[6]See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 34.
[7]Ibid., para. 8.
[8]See Human Rights Council resolution 33/30, paras. 3 and 7.